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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 339

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioner,

vs.

BROOKLYN UNION GAS COMPANY, ET AL.
Respondents.

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

W. H. DAVIDSON, JR.
3100 Travis Street,
Houston, Texas

AUSTIN C. WILSON
RICHARD L. McGRAW
8th Floor Bank of the
Southwest Bldg.
Houston, Texas

Attorneys for Cross-Petitioner,
Transcontinental Gas Pipe
Line Corporation

August, 1962

BORG PRINTING COMPANY OF TEXAS, HOUSTON, TEXAS

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented Conditionally	2
Statement	3
Reasons For Granting The Writ	5
Conclusion	7
Appendix	1a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 300

SOCONY MOBIL OIL COMPANY, INC.,
Petitioner,

vs.

BROOKLYN UNION GAS COMPANY, ET AL,
Respondents.

No. 303

MARATHON OIL COMPANY,
Petitioner,

vs.

BROOKLYN UNION GAS COMPANY, ET AL,
Respondents.

No. .....

BROOKLYN UNION GAS COMPANY,
Petitioner,

vs.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Respondent.

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Transcontinental Gas Pipe Line Corporation conditionally prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered on February 14, 1962, in *Socony Mobil Oil Company* v. *Brooklyn Union Gas Company,* and companion cases, 299 F.2d 692, the writ to issue only in the event this Court should grant the petition for a writ of certiorari in *Brooklyn Union Gas Company, et al,* v. *Transcontinental Gas Pipe Line Corporation,* No. ..., at this term.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 834; App., *infra*, pp. 1a-8a) is reported at 299 F.2d 692. The opinions of the District Court (R. 651, 754; App., *infra*, pp. 12a-24a, 25a-33a), adopted in substance by the Court of Appeals, are reported at 201 F. Sup. 673 and 679.

JURISDICTION

The judgment of the Court of Appeals was entered February 14, 1962 (R. 846; App., *infra*, p. 9a). A petition for rehearing, timely filed, was denied on May 21, 1962 (R. 968; App., *infra*, p. 10a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED CONDITIONALLY

Whether or not a money judgment can be entered in favor of plaintiffs against one defendant without judgment also being entered in favor of such defendant on its cross-claims against other defendants when the plaintiffs' rights against such defendant are founded entirely upon a Federal Power Commission order requiring payment over to plaintiffs of only any amounts which such cross-defendants might be "required" to pay to such defendant. (This question was not reached by the Courts below and similarly would not be reached by this Court unless the petition in *Brooklyn Union Gas Company, et al* v. *Socony Mobil Oil Company, Inc.*, No. ..... at this term of Court, is granted. Such petition by Brooklyn Union is conditioned upon the granting of either or both of the petitions in *Marathon Oil Company* v. *Brooklyn Union Gas Company, et al*, No. 303 at this term, and *Socony Mobil Oil Company, Inc.* v. *Brooklyn Union Gas Company, et al*, No. 300 at this term.)

STATEMENT

The jurisdiction of the District Court was invoked because of questions arising under orders issued by the Federal Power Commission pursuant to the Natural Gas Act in this Civil Action brought by Brooklyn Union and other customer companies of cross-petitioner Transcontinental Gas Pipe Line Corporation (Transco) as plaintiffs. They sought to recover from Transco, Socony Mobil Oil Company, Inc. (Mobil) and The Ohio Oil Company (Ohio), as defendants, moneys paid by plaintiffs to Transco and by Transco to Mobil and Ohio between March, 1955 and February, 1957, for natural gas in excess of the contract prices in effect on June 7, 1954, between Transco as buyer and Mobil and Ohio, respectively, as sellers.

These moneys were collected by Mobil and Ohio from Transco during the pendency of orders issued by the Court of Appeals for the Fifth Circuit staying the application of Orders 174 and 174A of the Commission as to Mobil and Ohio while these companies asserted their contentions that they were not subject to the jurisdiction of the Commission in proceedings in the Fifth Circuit and by petitions for certiorari to this Honorable Court. Certiorari was refused and judgment of dismissal in lieu of mandate was forwarded to the parties in such proceedings on February 4, 1957 (R. 496-497). After denial of certiorari Ohio and Mobil complied with the requirements of Order 174A.

During the pendency of these proceedings by Mobil and Ohio in the Courts, Transco settled a rate proceeding before the Commission with its customers, which settlement was embodied in a written agreement and approved by order of the Commission. Exhibits C and D to Plaintiffs Original Complaint (R. 63-91). The pertinent provision of the order read:

"(D) In the event any of the suppliers of Transco whose rates are currently in effect under an undertaking or under bond, or whose rates are currently being charged under Court stay orders shall be required to make refunds to Transco in respect to gas supplied under such rates, such portion, if any, of such refund attributable to natural gas purchased from said supplying company or companies by Transco after Transco's increased rates were permitted to become effective to cover such increased cost of gas shall be refunded to Transco's utility customers within sixty days after receipt of such refund by Transco. The amount of refund determined, as above stated, and any interest thereon, shall be divided by the total Mcf of sales during the refund period, exclusive of interruptible direct sales but including deliveries from storage under Rate Schedule S-2. The rate per Mcf so computed shall then be multiplied by the total Mcf of sales to each utility customer during such period under Rate Schedules CD-1, CD-2, CD-3, G-1, G-2, G-3, LTF and S-2 (deliveries from storage only) and the customer. Report to the Commission upon refunds under this Paragraph shall be made within 15 days of the payment of such refunds in accordance with the procedure heretofore prescribed in Paragraph (C) for the refunds there considered."

By January, 1959, neither Mobil nor Ohio had voluntarily refunded the moneys so collected; Brooklyn Union and others as plaintiffs sued Mobil, Ohio and Transco to recover such payments; Transco denied liability to plaintiffs but by cross claim and counter claims sought a declaratory judgment of the rights of all parties and of its customers other than plaintiffs. Mobil and Ohio denied any obligation to refund.

All parties filed motions for summary judgment and after extensive briefing and written arguments the District Court granted plaintiffs' motion for summary judgment

against Mobil and Ohio for the amounts collected in excess of the June 7, 1954 contract prices; granted Transco's motions for summary judgment that plaintiffs take nothing as against it and refused and denied all other motions. Based on the Court's first memorandum, Transco filed its Fourth Motion for Summary Judgment on behalf of its customers other than plaintiffs. By its second memorandum the Court granted Transco's motion and determined that interest was recoverable on the amount for which judgment was granted against Mobil and Ohio from the date of each payment but was not to be compounded from the date of judgment. Judgment was entered accordingly.

Appeals were taken by all parties. Mobil and Ohio wanted the judgment reversed and judgment rendered that no recovery be permitted against them; plaintiffs wanted judgment against Transco and interest compounded from the date of judgment it had already obtained against Mobil and Ohio; Transco as use-plaintiff for its customers other than plaintiffs asked that interest be computed for its other customers in the same manner as for plaintiffs.

The Court of Appeals affirmed the trial court's judgment as rendered, denying all appeals.

REASONS FOR GRANTING THE WRIT

Transco's cross-petition for certiorari is conditioned upon the granting of the petition for certiorari of plaintiffs, which in turn is conditioned upon the granting of the petitions of either Mobil or Ohio.

Transco is entirely satisfied with the judgments of the District Court and Court of Appeals. Its position is and throughout this litigation has been that the real controversy in this cause is between plaintiffs on the one hand and Mobil and Ohio on the other. As a use-plaintiff for the

benefit of its customers other than plaintiffs, it has contended throughout that these customers should receive exactly the same treatment accorded plaintiffs. Both the District Court and the Court of Appeals agreed with this contention and entered judgment accordingly.

Plaintiffs by their complaint sought judgment against Transco independent of their claim for judgment against Mobil and Ohio. Transco in its initial pleading sought, by way of cross-claim and counterclaim, a declaratory judgment of the rights and liabilities of all parties. The contentions of each party were embodied in motions for summary judgment.

Transco's motions were as follows:

(1) Partial summary judgment against all parties that plaintiffs and Mobil and Ohio are the real parties in interest and that Transco owes no duty but to account for any moneys it might receive as a stakeholder or interpleader. (R. 596)

(2) Summary judgment that plaintiffs take nothing as against Transco. (R. 597)

(3) Summary judgment over against Mobil and Ohio for any judgment plaintiffs might recover against Mobil and Ohio. (R. 598)

The District Court granted Transco's first and second motions (R. 659) and by so doing had no occasion to and therefore did not pass upon the matters tendered by Transco's third motion.

Plaintiffs by their petition for certiorari seek review of their right to judgment against Transco. Should such petition be granted, and Transco will undertake to show that it should not be by brief in opposition, then this conditional cross-petition of Transco should be granted so

that, should plaintiffs recover against it, Transco's right to judgment over against Mobil and Ohio in such event would be preserved.

CONCLUSION

For all of the foregoing reasons, this cross-petition for a Writ of Certiorari should be granted if Brooklyn Union's petition in this term of court is granted.

Respectfully submitted,

W. H. Davidson, Jr.
3100 Travis Street
Houston, Texas

Austin C. Wilson
Richard L. McGraw
8th Floor Bank of the
Southwest Bldg.
Houston, Texas

Attorneys for Cross-Petitioner,
Transcontinental Gas Pipe
Line Corporation

August, 1962

APPENDIX

INDEX

	PAGE
Opinion of the United States Court of Appeals for the Fifth Circuit, February 14, 1962	1a
Judgment of the United States Court of Appeals for the Fifth Circuit, February 14, 1962	9a
Judgment of the United States Court of Appeals for the Fifth Circuit, denying petition for rehearing, May 21, 1962	10a
Memorandum Opinion of United States District Court for the Southern District of Texas, June 29, 1960	12a
Additional Memorandum Opinion of the United States District Court for the Southern District of Texas, November 23, 1960	25a

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18941

SOCONY MOBIL OIL COMPANY, INC.,
Appellant,

versus

BROOKLYN UNION GAS COMPANY, ET AL.,
Appellees.

No. 18942

THE OHIO OIL COMPANY,
Appellant,

versus

BROOKLYN UNION GAS COMPANY, ET AL.,
Appellees.

No. 18943

BROOKLYN UNION GAS COMPANY, ET AL.,
Appellants,

versus

TRANSCONTINENTAL GAS PIPE LINE CORPORATION ET AL.,
Appellees.

No. 18944

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

Appellant,

versus

THE OHIO OIL COMPANY and SOCONY MOBIL OIL COMPANY, INC.

Appellees.

Appeals from the United States District Court for the Southern District of Texas.

(February 14, 1962)

Before TUTTLE, Chief Judge, and HUTCHESON and JONES, Circuit Judges.

HUTCHESON, Circuit Judge: These appeals from summary judgments of the United States District Court for the Southern District of Texas present many interesting questions of law. The district judge, in a memorandum opinion,[1] set forth these questions clearly and dealt with them in a thorough and completely correct way. It would serve no useful purpose therefore, for us to set the questions out or discuss them in detail here. It is sufficient to say that it is our view that the judgments should be affirmed throughout upon the opinion of the district judge.

[1] Brooklyn Union Gas Co., et al v. Transcontinental Gas Pipeline Corp., et al, (6-29-60) 201 F. Supp. 673.

Summed up, the appeals present on the side of the appellants, Socony Mobil Oil Company, Inc., Et Al, the primary contentions: (1) that because of a stay order entered by this court in *Magnolia Petroleum Co. v. Federal Power Commission*, 236 F (2) 785, in an appeal from Order No. 174-A of the Federal Power Commission, the rates collected by the appellants were legal and proper, and when the appeal was decided against the appellants by a dismissal and the stay order lapsed, the rates collected in the meantime could not be attacked and no refunds could be required as to them; and (2) that the proof failed to make out a case for restitution.

As the opinion of the district judge points out, this view proceeds from a misapprehension of the nature and effect of the stay order and of the state of the applicable law. As he also points out, this court dismissed the appeal in which the stay order was entered on the ground that Order No. 174-A, which was attacked by the appellants in that case, was not an appealable order, and this court did not, either in the order dismissing the appeal or in any other order entered by it, undertake to in any way validate the rates collected by the appellants. As he further points out, the rates paid during the pendency of the stay order were invalid and unlawful rates not merely because of the order of the Commission but because of Section 4 of the statute controlling and regulating gas rates and the regulations of the Commission promulgated as Orders Nos. 174 and 174-A. This section requires, in order for a rate to be legally effective, that the proposed rate be filed with the Commission; and unless there is such filing and the statutory time for the Commission's examination and approval has elapsed without disapproval, no proposed change of rate may be lawfully made, collected, and retained.

Here the evidence is undisputed that the proposed rates collected by the appellant, the recovery back of which was ordered by the district judge, were not filed with the Commission until long after they were collected, and equally undisputed that this court did not authorize, or attempt to authorize, the collection of any particular rate. It merely provided a stay of Commission action during the pendency of the appeal, and when the appeal was dismissed by this court and review was later denied by the Supreme Court, the stay order expired and lapsed, and the parties to the collection and payment of the rates in question were then remitted to the statutory law to determine their rights on the issue of restitution.

In addition to the attack on the judgment as unwarranted because the rates collected by them had been collected under a valid contract, appellants attack the judgment as erroneous because the claims against them were barred by limitation.

The district judge dealt carefully with this claim and we think correctly denied it. As the appellees correctly state in their brief, the court below did, and we may, decide the merits of this controversy by recognizing and determining the lawful rates on June 7, 1954. By finding what were the lawful rates in this case, the court below was not fixing any just or reasonable rate or granting reparations. Its action was solely ancillary to determining the effect of the stay orders and their dissolution, and of the failure of appellants to file their proposed changes of rates as required by statute and the regulations of the Commission. The rate settlement between plaintiffs and Transcontinental does not preclude such a determination on grounds of estoppel because the refund clause of the agreement between Transcontinental and Brooklyn plainly

declared that there might be refunds and that if there were, they would belong to the consumer plaintiffs.

Plaintiffs were entitled to recover on the merits because the only lawful rates from June 7, 1954, until appellant received approval from the Federal Power Commission of different rates were the contract rates in effect on June 7, 1954. Under Section 4 of the Natural Gas Act and Order 174-A, the contract rates in effect on June 7, 1954, the date of the Phillips decision, were the only lawful rates which could be collected until changed by filing the proposed changes with the Federal Power Commission as required by statute. Any rate changes provided for in the contract, whether by virtue of a "favored nations" or "escalation" clause or otherwise, constitute rate changes under the Natural Gas Act and are forbidden in the absence of compliance with the filing provisions of the Act and the regulations of the Commission.[2]

The stay orders issued by the Court of Appeals for the Fifth Circuit at the request of Mobil and Ohio et. al. did no more than prevent the Commission from interfering with the collection by Mobil and Ohio et. al. of rates above the June 7, 1954 level. When these stay orders were dissolved, and Mobil and Ohio et. al. filed their contracts with the Commission and the filings were accepted at the June 7, 1954, level, a duty of restitution arose, requiring Mobil and Ohio et. al to restore to Transcontinental and or plaintiffs amounts collected during the pendency of the stays in excess of the June 7th rate.[3]

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[2] Natural Gas Pipeline Co. of America v. Harrington, 246 F. (2) 915; Bel Oil Corp. v. Federal Power Commission, 255 F. (2) 548; Mississippi Power & Light Co. v. Memphis Natural Gas Co., 162 F. (2) 388.

[3] Natural Gas Pipeline Co. v. Harrington, 246 F. (2) 915; Arkadelphia Milling Co. v. St. Louis S. W. R. Co., 249 U. S. 134.

The stay orders cannot be construed as protecting Mobil and Ohio et. al. in the retention of the overcharges for two reasons: (1) this court does not have the authority to establish rates, and to construe the stay orders as approval of the increased rates would be to impute to the court the doing indirectly what the court could not do directly; and (2) although the stay orders, until dissolved, supported Mobil and Ohio's et. al. action in collecting the proposed rate for the time being, in the sense that the Commission was restrained from preventing them from making such collections, the stay orders did not attempt to, they could not, obviate the necessity of filing them in accordance with the statute and the regulations of the Commission. *United Gas Pipeline v. Mobile Gas Co.*, 350 U. S. 332 at 347. The stay orders neither by their terms nor by implication provided, nor could they have provided, that the statute and the regulations of the Commission, legislative in nature as they were, would not have to be complied with in order to effect a change in the rates, and nothing in the stay orders stated or implied that Mobil and Ohio et. al. could retain monies collected during the pendency of the stay orders on rates put into effect without complying with the statute and regulations.

A stay order does not adjudicate rights. It merely preserves the status quo. The status quo here was that until the proposed changes in rates by escaluation or otherwise, were filed with the Commission, they could not be legally collected, and that when the stay expired all unlawful exactions must be restored. At the time the stay orders were issued, the lawful rates established, by virtue of the Act and the regulations of the Commission, were the contract rates of June 7, 1954. The stay orders did not deal with, or attempt to change, this situation at all. This court did not, indeed could not, authorize an increase in the law-

ful rates. Such authority could be granted only by a compliance with the statute and regulations promulgated under its authority. The stay orders could not have had any effect on the statutory scheme. We think the court can not do better than to adopt the opinion of the district judge and affirm his judgments on the basis of it.

Another question raised in the case by the defendants-appellees arises out of the fact that, while the contract was made by the appellants with the Transcontinental Gas Pipe Line Corporation, the suit was brought by and for the benefit of Transcontinental's customers with Transcontinental intervening. Appellants-defendants, therefore, insist that there is no privity of contract between them and these customers and that there is no right of action in the customers to recover from them.

We think the district judge was right in respect of these contentions under the record in this case, which contains a notation in an order of the Commission in connection with the settlement made by Transcontinental with the plaintiffs, that any recoveries back which Transcontinental might be entitled to should be for the benefit of its customers. On the pleadings and the undisputed facts in this case, plaintiffs were real parties in interest and entitled to judgment as such.

In addition to these questions, there is a question which is brought up on the appeal of plaintiffs in the suits. This question is whether the judgment was wrong in not allowing interest on interest. These appellants insist that the judgment, which was for the amount of the unlawful rates collected without interest up to but not after the date of the judgment, was erroneous, and that judgment should have been for the amounts collected with interest to the judgment date, and this entire amount should have then borne interest from the date of the judgement.

The district judge was of the opinion that to allow a judgment such as this would be to allow compound interest and that the prevailing Texas rule, as stated in *McDaniel v. Miller*, 317 SW (2) 546, prevents this. The appellants, while conceding that the state of the law in Texas is confusing on this matter, argue that the McDaniel case is not controlling authority in Texas, that for its particular facts, the case was properly decided, but that *Frazier v. Campbell*, 5 Texas 275 and *Miner v. Parish Exchange Bank*, 53 Texas 559, decided the contrary.

While it is true that there is considerable confusion in the Texas decisions, we are inclined to follow Judge Ingraham's view[4] that the McDaniel case is authoritative here, and we are, therefore, of the opinion that the judgment should be affirmed on the plaintiffs' appeals as well as on the defendants' appeals.

We think the case was well tried throughout and, no substantial error appearing, the judgments are

AFFIRMED.

Reported: at 299 F 2d 692

[4] Brooklyn Union Gas et al. v. Transcontinental Gas Pipeline Corp. et al. (11-23-60) 201 F. Supp. 679.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1961

No. 18944

D. C. Docket Nos. 12474 and 12482 Civil

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

Appellant,

versus

THE OHIO OIL COMPANY and SOCONY MOBIL OIL COMPANY, INC.,

Appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before Tuttle, Chief Judge, and Hutcheson and Jones, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Feb 14 1962

FILED
21st Day of May, 1962
Edward W. Wadsworth
Clerk of the United States Court of Appeals.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18941

SOCONY MOBIL OIL COMPANY, INC.,
Appellant

VS.

BROOKLYN UNION GAS COMPANY, ET AL.,
Appellees

No. 18942

THE OHIO OIL COMPANY,
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VS.

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Appellees

No. 18943

BROOKLYN UNION GAS COMPANY ET AL
Appellants

VS.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION ET AL,
Appellees

No. 18944

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Appellant

VS.

THE OHIO OIL COMPANY and SOCONY MOBIL OIL COMPANY, INC.
Appellees

Appeal from the United States District Court for the Southern District of Texas.

(May 21, 1962)

On Petition for Rehearing

Before TUTTLE, Chief Judge, and HUTCHESON and JONES, Circuit Judges.

PER CURIAM:

It is ORDERED that the petitions for rehearing in the above entitled and numbered causes be, and they are hereby DENIED.

ORDER DENYING PETITIONS FOR REHEARING FILED — MAY 21, 1962

IN THE

United States District Court

SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BROOKLYN UNION GAS COMPANY,
CONSOLIDATED EDISON OF NEW YORK, INC.,
ELIZABETHTOWN CONSOLIDATED GAS COMPANY,
LONG ISLAND LIGHTING COMPANY,
PHILADELPHIA ELECTRIC COMPANY,
PUBLIC SERVICE ELECTRIC & GAS COMPANY,
SOUTH JERSEY GAS COMPANY,
PIEDMONT NATURAL GAS CO.,
THE UNITED GAS IMPROVEMENT COMPANY,
PUBLIC SERVICE CO. OF NORTH CAROLINA, INC.,
DELAWARE POWER & LIGHT CO.,
Plaintiffs,

VS.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
SOCONY MOBIL OIL COMPANY, INC.,
THE OHIO OIL COMPANY,
Defendants.

CONSOLIDATED
C.A. 12,474
and
C.A. 12,482

JUNE 29, 1960

These consolidated proceedings consist of actions in which plaintiffs, who are distributors of natural gas in eastern seaboard areas, seek restitution of monies paid by defendant Transcontinental Gas Pipe Line Corporation (Transco) to defendants Socony Mobil Oil Company, Inc. (Mobil) and The Ohio Oil Company (Ohio) through increases in price for natural gas sold and delivered to

Transco. The case is submitted upon the pleadings, affidavits, and motions for summary judgment of all parties concerned.

Transco operates under certificate from the Federal Power Commission an interstate natural gas pipe line from Texas to New York. Prior to June 7, 1954, Transco entered into separate natural gas purchase and sales contracts with Mobil and Ohio, covering natural gas from the West Gueydan Field in Vermillion Parish, Louisiana, and from the North Markham-North Bay City Field in Matagorda County, Texas, respectively. The Mobil contract included a "favored nations" clause providing for increases in price, while the Ohio contract contained a provision for periodic and tax reimbursement price increases. Prior to June 7, 1954, Transco commenced purchasing gas under these contracts, commingling it with other gas in its line and delivering it to customers, including plaintiffs, along its pipe line. Mobil's contract price on June 7, 1954, was 9.79150 cents per m.c.f., while Ohio's contract price on said date was 8.730376 cents per m.c.f.

On June 7, 1954, the Supreme Court of the United States held in Phillips Petroleum Co. v. Wisconsin, 1954, 347 U.S. 672, 74 S. Ct. 794, 98 L. Ed. 1035, that Phillips, a natural gas producer and gatherer, was a "natural gas company" within the meaning of that term as defined in the Natural Gas Act, 15 U.S.C.A. Sec. 717, et seq. Both Mobil and Ohio were and are engaged in the business of producing, gathering, and selling natural gas in interstate commerce. The Phillips decision is applicable to both of them. Thus the rates at which they sell natural gas are subject to regulation by the Federal Power Commission.

On July 16, 1954, the Federal Power Commission issued its Order No. 174, 19 F.R. 4534. Among other things, this

order required every independent producer engaged in the interstate transportation or sale of natural gas since June 7, 1954, to file with the Commission copies of rate schedules setting forth all rates and charges for the sale of natural gas which were in effect on June 7, 1954. The order further provided that no change could be made in these June 7, 1954, rates without first giving 30 days' notice of such change pursuant to Section 4(d) of the Natural Gas Act. Order No. 174-A of August 6, 1954, 19 F.R. 5081, and succeeding amendments, simplified and clarified the procedures by which producers apply for a certificate of public convenience and necessity but did not change the foregoing rate requirements.

Pursuant to Section 19(b) of the Natural Gas Act, Mobil and Ohio each filed a petition for review of Order No. 174-A in the United States Court of Appeals for the Fifth Circuit, questioning whether the Commission was empowered to regulate the price increase provisions of their contracts with Transco as changes in rate. These petitions sought a stay of that order concerning operations of Mobil and Ohio, including their contracts with Transco. In November 1954 a stay of Order No. 174-A as to Mobil and Ohio was issued by the Court of Appeals. Later, on June 30, 1956, the petitions for review were dismissed, though certification of the opinion and judgment to the Federal Power Commission was stayed by the court to permit the filing of applications for certiorari in the Supreme Court of the United States, which applications were denied on January 14, 1957. After denial of certiorari, the stay orders were dissolved on February 1, 1957. Magnolia Petroleum Company, et al. v. Federal Power Commission, 5 Cir., 1956, 236 Fed. (2d) 785.

Only after denial of certiorari did Mobil and Ohio file their Transco contracts with the Federal Power Commis-

sion as rate schedules or otherwise. During the pendency of the stay order from February 1, 1955, through January 31, 1957, charges were made to Transco by both Mobil and Ohio in excess of the rates which were in effect on June 7, 1954. Though made pursuant to the price increase provisions of the Transco contracts, such charges were made without giving 30 days' notice thereof to the Federal Power Commission and to the public in accordance with the provisions of Section 4(d) of the Natural Gas Act and as required by Order No. 174-A. The amounts involved in this controversy are the payments in excess of the rates in effect on June 7, 1954, made by Transco to Mobil and Ohio during the period from February 1, 1955, through January 31, 1957.

On November 26, 1954, Transco filed rate schedules with the Federal Power Commission providing for increases in the rates to be charged by Transco to plaintiffs and other public utility and industrial customers for natural gas service. Another filing seeking additional increases was made by Transco on January 20, 1955. The Federal Power Commission consolidated these matters and commenced hearings on June 20, 1955, which continued for some months. Meanwhile the rates filed on November 26, 1954, went into effect on February 1, 1955. With matters in this status, each plaintiff entered into an agreement with Transco on October 5, 1955, for the complete settlement of Transco's rate proceedings before the Federal Power Commission, which was made a part of the record of the proceedings before the Commission.

On November 7, 1955, the Federal Power Commission issued an order approving the proposed rate settlement. Among other things this order contained the following specific provision:

"In the event any of the suppliers of Transco whose rates are currently in effect under an undertaking or under bond, or whose rates are currently being charged under court stay orders shall be required to make refunds to Transco in respect to gas supplied under such rates, such portion, if any, of said refund attributable to natural gas purchased from said supplying company or companies by Transco, after Transco's increased rates were permitted to become effective to cover such increased cost of gas, shall be refunded to Transco's utility customers within 60 days after receipt of such refund by Transco . . ."

Both the agreement and the order provide a detailed method of computing the refund to be paid to each of Transco's utility customers. On January 10, 1959, all plaintiffs, except Delaware Power & Light Company, instituted Civil Action No. 12,474 in this court against Transco, Mobil, and Ohio. On January 12, 1959, Delaware Power & Light Company filed a similar action in the District Court of Harris County, Texas, 127th Judicial District, under Docket No. 520,558, which cause was thereafter removed to this court by Transco as Civil Action No. 12,482 and was later consolidated with C.A. No. 12,474. In C.A. 12,474 plaintiffs seek a total recovery in the amount of $912,414.72, plus interest, and separately claim from Mobil and Ohio the sums of $494,626.64 and $417,788.08, respectively. In C.A. 12,482 the total amount sought is $25,378.60, plus interest, while the separate claims against Mobil and Ohio are $13,757.92 and $11,620.68, respectively.

The basis of plaintiffs' action against Mobil and Ohio is that the contract rates in effect between Transco and Mobil and Ohio on June 7, 1954, were the only lawful rates which could be charged for gas delivered by Mobil and Ohio to Transco during the period from February 1, 1955, through January 31, 1957. During this period the charges in excess of the alleged lawful rate were passed on to plaintiffs and

other customers of Transco. As the real parties in interest, plaintiffs now seek restitution of what they consider to be their just portion of the excess charges. Asserting Transco's claims against Mobil and Ohio, they maintain that Transco has effectively assigned to plaintiffs said claims in its answer, counter-claim, and cross-claim.

Against Transco plaintiffs claim any monies that it may recover from Mobil and Ohio, since the agreements and order provide for such a refund in the event any of the suppliers of Transco, whose rates were being charged under court stay orders, were required to make refunds to Transco. They contend, however, that Transco is liable to them regardless of whether it has collected from Mobil and Ohio and even though it might not have collected had it vigorously pursued its remedies. They rest Transco's said liability upon an implied obligation arising under the refund provision of the settlement agreements and order to exercise reasonable diligence to secure the refunds due Transco, including the timely filing and good faith prosecution of suits, if necessary, against Mobil and Ohio. They maintained that Transco has not fulfilled this obligation by merely filing a cross-action for declaratory relief in the present action and failing to pursue vigorously its rights against Mobil and Ohio in plaintiffs' behalf.

Mobil contends that neither plaintiffs nor Transco can recover any monies from it, since the court does not possess the legislative power of rate-making and cannot fix or determine what were the just and reasonable rates for Mobil's gas sold to Transco and cannot award reparations. It claims that the Federal Power Commission approved rates in Transco's rate proceeding designed to recover Transco's cost of service, including recoupment of charges paid Mobil by Transco, on representations that such costs, expenses, and rates which would recoup them were proper, just, and lawful as the Natural Gas Act requires. Whereby

Mobil argues that plaintiffs and Transco have no right of recovery and ought to be estopped from asserting that such costs and expenses are unlawful, unjust, and unreasonable. It maintains that the Fifth Circuit's stay order fully protected Mobil from any refund. It cites various reasons why recovery by plaintiffs would be inequitable and asserts that Transco cannot recover upon its counterclaim and cross-claim for declaratory judgment.

Ohio contends that the Fifth Circuit's stay order granted it full immunity from the requirements of Order No. 174-A and of Section 4 of the Natural Gas Act and that there can be no recovery because the court of appeals did not condition the stay on the giving of any bond or any agreement to refund. It argues that the court is not authorized to award reparations. It would show that plaintiffs' claim, if any ever existed, is now barred by limitations, citing Article 5526, Revised Civil Statutes of Texas, which applies to debts where the indebtedness is not evidenced by a contract in writing. Ohio then sets forth the equitable considerations supporting judgment in its favor and against judgment for plaintiffs.

Transco contends that the real controversy is between plaintiffs and Mobil and Ohio and that its only obligation, in the nature of a stakeholder's or interpleader's, is to pay over and account to plaintiffs for any monies that plaintiffs may recover from Mobil and Ohio and that the court may direct be paid to Transco by Mobil and Ohio for distribution to plaintiffs. It maintains that plaintiffs have failed to state an independent claim against Transco arising out of the refund provision of the settlement agreements and order.

The court believes that the following actions should be taken on the motions for summary judgment. Plaintiffs'

first motion for summary judgment against Mobil and Ohio should be granted, while their second motion against Transco should be denied. Transco's first and second motions for summary judgment should be granted. The motions for summary judgment of Mobil and Ohio should be denied.

This case can be decided on motions for summary judgment in favor of plaintiffs and Transco, since there is no genuine issue as to any material fact and since said moving parties are entitled to judgments as a matter of law. Mobil and Ohio contend that there are genuine issues of material fact, namely, whether any of the gas sold to Transco was resold to plaintiffs and, if so, what portion reached each plaintiff and what amounts of money, if any, may be recovered by each plaintiff from Mobil and Ohio. These alleged issues are irrelevant because plaintiffs are asserting Transco's cause of action. Mobil and Ohio do not contest the amount of gas delivered to Transco nor the amounts charged therefor. The higher rates charged by Mobil and Ohio resulted in greater charges to plaintiffs by Transco. What distribution of over-payments to Mobil and Ohio is made to Transco's customers is a matter between Transco and its customers. It is no ground upon which Mobil and Ohio can avoid repayment, if they are protected from further payment or a multiplicity of suits.

The amounts that plaintiffs seek to recover against Mobil and Ohio are shown in Exhibit "E" attached to plaintiffs' original complaints, which amounts are certified by the affidavit of J. T. Duncan, Assistant to the Financial Vice-President of Transco. All of the plaintiffs are utility customers of Transco; each was a party to the settlement agreements with Transco which were approved by the Federal Power Commission. The amounts alleged to be due to each plaintiff, as set forth in Exhibit "E", were computed

in accordance with the formula stated by the Federal Power Commission in its order approving the rate settlement with Transco.

Plaintiffs are the assignees of Transco's cause of action and are the real parties in interest. Transco effectively assigned its claims against Mobil and Ohio to plaintiffs by its pleadings. See Transco's answer, counter-claim, and cross-claim, p. 8, par. (c); p. 15, par 33; and p. 22, par. 19. All the parties to the assignment are before the court. So long as Mobil and Ohio can satisfy their obligation to Transco by paying plaintiffs, which Transco freely states, any defense to the assignment which could be asserted by Transco in a suit by plaintiffs against Transco is of no consequence to Mobil and Ohio.

Plaintiffs' claims are not barred by limitations, since neither the two-year period of Article 5526 nor the four-year period of Article 5527, Vernon's Texas Civil Statutes, would bar recovery. Article 5526 applies to actions for debt where the indebtedness is not evidenced by a contract in writing. Covering many actions for "money had and received", Ohio contends that said statute applies to the case at bar. Article 5527 refers to actions for debt where the indebtedness is evidenced by or founded upon any contract in writing. Plaintiffs contend that the latter statute governs the case at bar. The controlling question, however, is the date upon which the cause of action arose. It is evident that the cause of action did not arise until the day when the stay orders were dissolved, namely, February 1, 1957. The excess rates were lawfully collected during the pendency of the stay orders. Natural Gas Pipeline Co. of America v. Harrington, 5 Cir., 1957, 246 Fed. (2d) 915. Since these actions were filed on January 10 and 12, 1959, it is apparent that they are not barred by either the two-year or the four-year statute of limitations; nor can

plaintiffs' claims be considered barred by laches, since no extraordinary circumstances exist whereby said claims should be barred before the period of limitations has run. Culver v. Pickens, 1943, 176 S.W. (2d) 167.

The court may decide the merits of this controversy by recognizing and determining the lawful rates on June 7, 1954. Magnolia Petroleum Company v. Texas Illinois Natural Gas Pipeline Company, S.D. Tex., 1954, 130 Fed. Supp. 890. By finding the lawful rates as established by order of the Federal Power Commission, the court is not fixing any just or reasonable rate or granting reparations. Its action is solely ancillary to determining the effect of the stay orders and their dissolution. The rate settlement between plaintiffs and Transco does not preclude such a determination on grounds of estoppel because its refund clause plainly contemplated that there might be refunds that would be passed along to plaintiffs.

Plaintiffs are entitled to recover on the merits because the only lawful rates from June 7, 1954, until Mobil and Ohio received approval from the Federal Power Commission of different rates were the contract rates in effect on June 7, 1954. Under Section 4 of the Natural Gas Act and Order 174-A the contract rate in effect on June 7, 1954, the date of the Phillips decision, was the only lawful rate until changed by filing with the Federal Power Commission. This is true even though the contract rate was unfiled. Any rate changes provided for in the contract, filed or unfiled, whether by virtue of a "favored nations" or "escalation" clause or otherwise, constitute rate changes under the Natural Gas Act and are forbidden in the absence of compliance with the filing provisions of the Act. Natural Gas Pipeline Co. of America v. Harrington, supra; Bel Oil Corporation v. Federal Power Commission, 5 Cir., 1958, 255 Fed. (2d) 548; Mississippi Power & Light Co. v. Mem-

phis Natural Gas Company, 5 Cir., 1947, 162 Fed. (2d) 388; Cities Service Gas Producing Co. v. Federal Power Commission, 10 Cir., 1956, 233 Fed. (2d) 726; Amerada Petroleum Corporation v. Federal Power Commission, 10 Cir., 1956, 231 Fed. (2d) 461; Phillips Petroleum Co. v. Federal Power Commission, 3 Cir., 1958, 258 Fed. (2d) 906; Episcopal Theological Seminary v. Federal Power Commission, D.C., 1959, 269 Fed. (2d) 228.

The stay orders issued by the Court of Appeals for the Fifth Circuit at the request of Mobil and Ohio temporarily allowed them to increase their prices above the June 7, 1954, level without approval by the Federal Power Commission. When those stay orders were dissolved and Mobil and Ohio filed their contracts with the Commission, the filings were accepted at the June 7, 1954, level. A duty of restitution arose, requiring Mobil and Ohio to restore to Transco amounts collected during the pendency of the stays in excess of the June 7 rate. Natural Gas Pipeline Co. of America v. Harrington, supra; Arkadelphia Milling Co. v. St. Louis S.W.R.Co., 1919, 249 U.S. 134, 39 S.Ct. 237, 63 L.Ed. 517; Berthold-Jennings Lumber Co. v. St.Louis I.R.& S.Ry.Co., 8 Cir., 1935, 80 Fed.(2d) 32.

The stay orders cannot be construed as protecting Mobil and Ohio in the receipt of overcharges for two reasons: (1) courts do not have the authority to establish rates and construing the stay orders as approval of the increased rates imputes to the court an attempt to do indirectly what it cannot do directly and (2) although the stay orders, until dissolved, relieved Mobil and Ohio of the necessity, for the time being, of filing in accordance with Order No. 174-A, the stay orders neither by their terms nor by implication provided that Mobil and Ohio could retain monies collected during the pendency of the stay orders nor did the orders relieve them from the consequences of their

failure to comply with Order 174-A. A stay order does not adjudicate rights but merely preserves the status quo. Scripps-Howard Radio, Inc. v. Federal Communications Commission, 1942, 316 U.S. 4, 62 S.Ct. 875, 86 L.Ed. 1229.

At the time the stay orders were issued, the lawful rates had been established as the contract rates of June 7, 1954. Natural Gas Pipeline Co. v. Harrington, supra. Since the Fifth Circuit could not authorize an increase in the lawful rate, the stay orders could not have had that effect, and the court could have intended nothing more than to permit Mobil and Ohio to collect the higher rates until the final determination of that case. In the Berthold-Jennings and Arkadelphia cases the railroads obtained injunctions against the state railroad commission's enforcement of the established maximum freight rates, which injunctions permitted the railroads to collect higher rates. After the dissolution of the injunctions, the railroads were required to repay the over-charges they had collected on the theory of restitution. The fact that no bond had been required of the railroads after the granting of the permanent injunction did not alter the result.

In this case Mobil and Ohio obtained stays of the Federal Power Commission's order, which permitted them to collect higher rates. After the dissolution of the stay orders, they must repay the charges they have collected in excess of the lawful rates. In collecting the increased rates under the stay orders, they assumed the risk of being required to refund them if the litigation terminated adversely to them.

Since plaintiffs can recover against Mobil and Ohio, it is unnecessary to determine whether they state an independent claim against Transco arising out of the refund provision of the settlement agreements and order.

Plaintiffs' first motion for summary judgment against Mobil and Ohio will be granted. Their second motion for summary judgment against Transco will be denied. Transco's first and second motions for summary judgment will be granted. The motions for summary judgment of Mobil and Ohio will be denied.

JOE INGRAHAM,
United States District Judge

Reported at 201 F.S. 673

IN THE

United States District Court

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

B

BROOKLYN UNION GAS COMPANY,
CONSOLIDATED EDISON OF NEW YORK, INC.,
ELIZABETHTOWN CONSOLIDATED GAS COMPANY,
LONG ISLAND LIGHTING COMPANY,
PHILADELPHIA ELECTRIC COMPANY,
PUBLIC SERVICE ELECTRIC & GAS COMPANY,
SOUTH JERSEY GAS COMPANY,
PIEDMONT NATURAL GAS CO.,
THE UNITED GAS IMPROVEMENT COMPANY,
PUBLIC SERVICE CO. OF NORTH CAROLINA, INC.,
DELAWARE POWER & LIGHT CO.,
Plaintiffs,

VS.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
SOCONY MOBIL OIL COMPANY, INC.,
THE OHIO OIL COMPANY,
Defendants.

CONSOLIDATED
C.A. 12,474
and
C.A. 12,482

NOVEMBER 23, 1960

In opinion filed June 29, 1960, plaintiffs, distributors of natural gas, were given restitution of monies paid by Transcontinental Gas Pipe Line Corporation (Transco) to its co-defendants, Socony Mobil Oil Company, Inc. (Mobil) and The Ohio Oil Company (Ohio), through increase in price

for natural gas sold and delivered to Transco. Defendant and cross-plaintiff Transco's fourth motion for summary judgment and alternative motion for severance is before the court. This motion deals with Transco's right to recover from Mobil and Ohio, for the use and benefit of its customers other than plaintiffs, the sum of $56,120.41, together with interest thereon. This amount represents the difference between the sum of $937,793.32 which plaintiffs will recover from Mobil and Ohio under the rulings of this court and the total of $993,913.73 paid by Transco to Mobil and Ohio from February 1, 1955, to February 1, 1957, in excess of contract prices in effect on June 7, 1954. Names of these customers (other than plaintiffs) and amounts payable to each are found in the affidavit attached to this fourth motion.

Transco's alternative motion for severance will be denied. The subject matter of the so-called fourth motion has already been submitted to the court. This motion should be disposed of and and not tried piecemeal. The claims asserted by plaintiffs and the claim sought to be asserted by Transco on behalf of its other utility customers arise out of the same factual circumstances. Should Mobil and Ohio appeal, the whole matter should be taken up. Fed. Rule Civ. Proc. 54(b) will not be used here.

Mobil's and Ohio's answers to the fourth motion of Transco urge two grounds for denial: (1) lack of jurisdiction in that no diversity, requisite amounts, or federal questions are shown; and (2) unresolved factual issues bar summary judgment. The court is however of opinion that jurisdiction is present and that no factual issues remain. Transco's fourth motion for summary judgment will be granted. These two supposed impediments will be disposed of separately.

Much is said at page two of Mobil's answer about lack of diversity and amounts involved. Mobil's briefs in support of its motion for summary judgment make the same argument. This court necessarily rejected these contentions by overruling Mobil's motions for summary judgment in their entirety. Further, Transco's motion is a cross-claim within Fed.Rule Civ.Proc.13(g). As such it is ancillary to the related, principal claim. No independent jurisdictional basis need be laid for a cross-claim. 3 Moore's Federal Practice, Sec. 13.36 (2d Ed. 1948). Our circuit court so held in Childress v. Cook, 245 Fed.(2d) 798, 802-805 (5th Cir. 1957).

Mobil and Ohio argue that certain factual issues are yet unsettled. These are said to prevent summary judgment. These issues summarized are what amounts, if any, of the gas sold to Transco was resold to these customers of Transco, not named as plaintiffs, and what amounts of money, if any, may be recovered by each customer from Mobil and Ohio. Mobil and Ohio do not contest the amount of gas delivered to Transco nor the charges therefor. These issues are irrelevant for the reasons suggested in the opinion of June 29, 1960. They are disposed of at pages eleven and twelve thereof. The court remains of the view announced at page eleven, second paragraph of the June opinion, ". . . there is no genuine issue as to any material fact . . ."

It necessarily follows from my rejection of severance of Transco's fourth motion that the form of judgment tendered by plaintiffs will not suffice. That form does not reflect this disposition of the fourth motion. The final judgment to be entered herein must include today's granting of Transco's motion. Mobil and Ohio level other criticisms at plaintiffs' proposed judgment. These will now be considered.

Plaintiffs have tendered a form of judgment which would permit recovery from Mobil of $643,363.30 and from Ohio the sum of $544,744.86. The figures recoverable as the excess over the rates of June 7, 1954, were respectively $508,384.56 and $429,408.76. Thus, plaintiffs have tendered a judgment which will permit them recovery of $250,314.84 in excess of the principal amount allowed by the opinion of June 29, 1960. This difference constitutes interest for the withholding of such sums from the dates on which such sums were received from Transco by Mobil and Ohio. At page three of plaintiffs' motions for summary judgment such interest was requested. This court so noted at page seven of the June opinion. Mobil and Ohio state that this opinion did not allow such interest, and hence plaintiffs' proposed judgment is excessive by this interest amount. In any event Mobil and Ohio strenuously object to allowance of interest on the principal. Briefs have been submitted which purport to show the impropriety of interest on a restitutory award.

While the matter received no explicit treatment in the opinion of June 29, 1960, an award of interest may be implied from the granting of plaintiffs' first motion for summary judgment against Mobil and Ohio at page eleven therein. That motion included a request for interest. The issue deserves a fuller treatment. I conclude that such interest should be allowed. The governing principle is well stated in Restatement, Restitution, Sec. 156 (1937):

> "... A person who has a duty to pay the value of a benefit which he has received, is also under a duty to pay interest upon such value from the time he committed a breach of duty in failing to make restitution if, and only if: ... (b) the value of the benefit can be ascertained by mathematical calculation from the terms of an agreement between the parties or by established market prices ..."

The comment to this section at page 620 notes the obligation to pay interest from the time when the money should have been paid. Our court of appeals cited the Restatement in an analogous case to support a similar award of interest. Natural Gas Pipeline Co. of America v. Harrington, 246 Fed. (2d) 915, 921 (5th Cir. 1957). This case is determinative of plaintiffs' right to recover interest on the excess payments, at least from February 1, 1957, the date of dissolution of the stay order. Natural Gas paid an increased price pursuant to an Oklahoma minimum price order. That order was invalidated by the United States Supreme Court; Natural Gas sued for recovery of excess payments. The court of appeals held that interest should accrue from the date the minimum price order was invalidated.

Okeechobee County, Fla. v. Nuveen, 145 Fed. (2d) 684, 687 (5th Cir. 1944), indicates the district courts are vested with considerable discretion in the awarding of interest damages upon restitutory sums. Considerations of fairness and traditional equitable principles are to guide the exercise of this discretion. Allowance of interest seems best to accord with these guide-lines in this instance. The cases cited by Mobil and Ohio have been considered. They too stress this discretionary role. This interest is allowed as a means of compensating plaintiffs' loss of use of their monies.

Additional interest difficulties remain. Plaintiffs and defendants are not in accord on the period for commencement of this interest. Plaintiffs say interest should run from the date the respective monthly payments were made by Transco to Mobil and Ohio. They have so computed interest in their form of judgment. Mobil and Ohio argue that such starting points are not consonant with the court's memorandum in June. They conclude from that opinion,

especially page eight, that they were entitled to collect, during the stay period, the contractual increases. Under the court's rationale, they declare, there could be no duty of restitution during that period. They cite page thirteen of the opinion as indicating the cause of action in restitution arose on February 1, 1957. Necessarily, the court is told, no interest can be claimed before that date, for no duty of restitution existed prior thereto.

Defendants' argument has considerable logical appeal. Yet, Mobil and Ohio have had the use of this money from the date of its receipt. Similarly, plaintiffs have been deprived of the use of such funds from the time these increased rates were reflected in Transco's charges to them. Equitable considerations compel the conclusion that interest should commence from the respective dates of Transco's overpayments to the defendants. Plaintiffs' motion for judgment so provides. Mississippi River Fuel Corp. v. Federal Power Commission, 281 Fed. (2d) 949 (D.C. Cir. 1960), supports this conclusion. The ruling of the Federal Power Commission in a similar interest question is therein approved. The Commission ordered ". . . interest at the rate of 6 per cent per annum from the date of receipt of such excess amounts to the date of refund." 21 F.P.C. 48, 53. Language in Natural Gas Pipeline Company of America v. Harrington, supra, buttresses this result. The factual situation of this case has been referred to, supra. The court of appeals granted interest from the date the minimum price order was held invalid. Interest before that date was declined because the recipient of increased prices had not received them due to its fault or volition. Here, however, as noted at page eighteen of my prior opinion, Mobil and Ohio actively sought and obtained the stay order. The excess charges were not of the windfall variety present in Harrington. They came

to Mobil and Ohio due to their own volition. They should pay interest on the funds withheld from the time of their receipt, not just from February 1, 1957.

There remains one other question with regard to interest. Plaintiffs have accrued interest prior to the rendition of the judgment and included such interest in the principal sum as interest damages. Then they provide in their tendered judgment that the amounts set forth in the judgment shall bear interest at the rate of 6% per annum. Defendants claim plaintiffs have thus figured the interest contrary to the rule that compound interest is not allowed in the absence of a contract providing therefor. Cherokee Nation v. United States, 270 U.S. 476 (1926), is said to be contrary. The Texas rule allegedly prevents this. McDaniel v. Miller, 317 S.W.(2d) 546, 549 (Ct.Civ.Apps.1958), is cited. The court therein held it to be improper to include interest as a part of the principal sum of the judgment and then allow the judgment to draw interest at the rate of 6% per annum. Plaintiffs' answer to Ohio's reply to its motion for judgment at pages six and seven admits McDaniel is contrary to their view. They cite earlier cases from Texas as presenting a different view; McDaniel is "wrong", plaintiffs declare. It is clear that this is a matter to be determined by state law. T. & M. Transport Co. v. Shattuck Chemical Co., 158 Fed.(2d) 909 (10th Cir. 1947); Herd & Co. v. Krawill Machinery Corp., 256 Fed.(2d) 946 (4th Cir. 1958), aff'd 3 L.Ed.(2d) 820 (1959).

The Texas cases are rather confusing on this matter. On the one hand, as indicated supra, McDaniel denies interest on that portion of the judgment which constitutes interest on the principal. Plaintiffs cite five earlier cases which they say are contrary to McDaniel. None of these five are cited in McDaniel; indeed, the Texas Court of Civil Appeals cited no authority for its holding therein.

Frazier v. Campbell, 5 Tex. 275 (1849), is said by plaintiffs to first establish the law in Texas on this issue. It is true that the Supreme Court of Texas allowed interest on a judgment containing interest; the case, however, may be distinguishable in that the instrument sued upon specified what interest the principal was to bear. In this case the interest granted herein on the principal was not consensual in origin but judicially allowed. Miner v. Paris Exchange Bank, 53 Tex. 559 (1880), alludes to Frazier, supra, but it is inapposite, for it concerns usury, not interest on judgments. The remaining cases cited by plaintiffs allowed interest on that portion of the judgment which constituted interest. On first reading they seem to conflict with McDaniel. All however involve consensual or contractual interest on a principal. Like Frazier, they concern instruments carrying in their provisions interest. McDaniel is more analogous to the present situation, for it dealt with a judgment for judicially-imposed interest. McDaniel must guide my decision. Hence, interest will be granted only on that portion of the judgment which constitutes principal and not interest.

Mobil and Ohio have further objections to the tendered form of judgment. The first paragraph following the figures on page three of the proposed judgment grants judgment against plaintiffs and in favor of Transco on plaintiffs' suit against Transco, but awards court costs thereon to Transco against Mobil and Ohio. As to that such costs should be taxed against plaintiffs. Mobil properly objects to being taxed for plaintiffs' failure in that respect.

Said judgment as drawn constitutes a taxation of costs jointly against Mobil and Ohio. The causes of action against the two were different. The only common fact was that both sold gas to Transco. No basis appears for joint

taxation of costs against Mobil and Ohio. Hence, costs will be taxed separately against Ohio and Mobil. The costs of the fourth motion of Transco will be taxed separately against Ohio and Mobil.

A notice of appeal was included in the form of judgment. Mobil and Ohio object thereto, preferring to give their own. The notice of appeal will be deleted from the proposed judgment.

I now summarize the conclusions arrived at herein. Transco's alternative motion for severance will be denied, while its fourth motion for summary judgment will be granted. Interest on the principal sum involved in said fourth motion may accrue from the time of the respective overpayments by Transco to Mobil and Ohio. The form of judgment next tendered must reflect this disposition of the fourth motion. Plaintiffs' proposed form of judgment properly contains interest on the principal computed from a series of beginning dates arising prior to February 1, 1957. Interest on the judgment itself may be computed only on that portion of the judgment which constitutes principal. For example, plaintiffs' interest figure of $250,314.84 may not itself bear interest. Costs will be taxed separately against Mobil and Ohio. Plaintiffs will bear the costs of their failure to obtain judgment against Transco. No notice of appeal will be included.

The clerk will notify counsel to draft and submit appropriate judgment.

JOE INGRAHAM
United States District Judge

Reported at 201 F.S. 679